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Supreme Court, U.S.
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NO. 96-156

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

EDWARD MURRAY, in his official capacity as Director of the Virginia Department of Corrections (VDOC); JOHN DOE, 1-7, in their official capacities such fictitious names being designated to identify those VDOC employees whose true identities are now unknown to plaintiff-intervenor, but who serve as (a) members of the VDOC Publication Review Committee, (b) Warden or Superintendent of Keen Mountain Correctional Center (KMCC), and (c) functional KMCC mailroom censor,

Petitioners,

v.

MONTCALM PUBLISHING CORPORATION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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Question Presented

1. Whether Virginia Department of Corrections Operating Procedure 852 is unconstitutional because it fails to provide a publisher with notice that its publication has been disapproved for receipt by the subscribing inmate and with an opportunity to submit a brief written response thereto.

Statement of No Parent or Susidiary Companies

In compliance with Rule 29-.6 of the Rules of Court, respondent states that there are no parent companies or nonwholly owned subsidiary companies of Montcalm Publishing Corporation to be listed.

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Constitutional Provisions, Statutes and Rules

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EDWARD MURRAY, in his official capacity as Director of the Virginia Department of Corrections (VDOC); JOHN DOE, 1-7, in their official capacities such fictitious names being designated to identify those VDOC employees whose true identities are now unknown to plaintiff-intervenor, but who serve as (a) members of the VDOC Publication Review Committee, (b) Warden or Superintendent of Keen Mountain Correctional Center (KMCC), and (c) functional KMCC mailroom censor,

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BRIEF IN OPPOSITION

Constitutional Provisions, Statutes and Rules Involved

This case involves the straightforward application of the Due Process clause of the Fourteenth Amendment to the United States Constitution to Virginia Department of Corrections Division Operating Procedure 852 (henceforth DOP 852), which does not

provide for notice to and an opportunity to be heard by a publisher whose publication has been disapproved for distribution to an inmate-subscriber.

Statement of the Case

A. Introduction

Virginia prison officials are authorized by regulation, promulgated by the VDOC pursuant to authority granted by Section 53.1 – 35 of the Code of Virginia, *see* DOP 852 § II, to deny inmates access to certain written publications to which they have specifically subscribed. That regulation provides in relevant part as follows:

> The Warden/Superintendent, or his designee, will disapprove a publication for receipt and possession by an inmate on grounds of obscenity if:
>
> 1. The publication depicts or describes sexual conduct in such a way to include, either:
>
> a. Representations or descriptions of actual sexual intercourse, normal or perverted, anal or oral; or,
>
> b. Representations or descriptions of excretion in the context of sexual activity or lewd exhibitions of uncovered genitals in the context of masturbation or other sexual activity; *and*
>
> 2. A reasonable person viewing

> the depiction or representation would find that the material taken as a whole appeals to a prurient interest in sex.

DOP 852 § VIII.D. (emphasis added). Section VII.A. provides that "[t]he Warden/Superintendent of each facility will approve or disapprove publications for receipt by inmates on a case-by-case and/or issue-by-issue basis."[1] (The full text of DOP 852 is set forth in the Petition for a Writ of Certiorari at Appendix H.)

Wholly absent from these regulations is any requirement that the publisher of magazines which are disapproved for receipt by the inmate-subscriber be provided with notice of and an opportunity to comment on the disapproval.

B. Factual Background

Montcalm is the publisher of *Gallery* magazine, a monthly publication which is sold at newsstands and by subscription in the Commonwealth of Virginia and elsewhere. Each issue of Gallery includes, inter alia, articles, fiction, commentary, photographic layouts of nude women, and paid advertisements. *Gallery* has received awards for literary and artistic merit, including the prestigious O'Henry Award for short fiction and the Print's Regional Design Annual

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[1] Notwithstanding the unambiguous text of DOP 852, petitioners persistently refuse to acknowledge either that the regulation calls for a two-part test to determine the propriety of permitting an inmate to receive the magazine(s) to which he has subscribed or that an issue-by-issue review of a monthly magazine is required.

Certificate of Design Excellence and has been cited as authority in the Congressional Record for a series of articles concerning various ethnic groups in the United States. *Gallery* has never been found to be obscene under the *Miller v. California* standard in any proceeding to which Montcalm has been a party.

Donald Hodges (Hodges) and Michael Flora (Flora), inmates at Keen Mountain Correctional Center (KMCC), one of many correctional facilities maintained by the VDOC, were *Gallery* magazine subscribers at the time Montcalm mailed their subscription copies of the June 1992 through September 1992 issues of *Gallery* to them at KMCC.

Hodges and Flora each commenced *pro se* civil rights actions after the VDOC informed them that they would not be permitted to receive their subscription copies of the June 1992 and September 1992 issues of *Gallery* because those issues allegedly violated DOP 852. They had, however, received *Gallery* through May 1992 and the July and August 1992 issues. The VDOC informed the inmates that these issues were being withheld from them because certain written passages in the magazines, not shown to either of them, described explicit sexual conduct in a manner inconsistent with the "obscenity criteria" of DOP 852. The sole expressed basis for the disapproval of the June 1992 and September 1992 issues of *Gallery* was the written and not the photographic content. Allegedly, up to June 1992, only the pictorial content had been reviewed by the prison officials. The July 1992 issue was never forwarded to the Publication Review Committee (PRC) of the VDOC and hence was

received by the inmate-subscriber. The August 1992 issue was reviewed again by the PRC at the request of the prison, but was approved for receipt by the inmate-subscriber. After the present suit was filed, the PRC examined the July 1992 issue and reexamined the August 1992 issue. The PRC now concluded that these issues violated DOP 852 and were consequently disapproved. Petitioners contend that these issues of *Gallery* were subject to a "better" review but they point to nothing in the record to support this assertion. *See* Petition at 24.

In the defendants' previously-denied summary judgment motions in these actions, the District Court (Kiser, Ch. J.) reviewed not only the withheld June 1992 and September 1992 *Gallery* issues, but also the July 1992 and August 1992 issues of *Gallery* which the inmates had been permitted to receive and which they submitted to the Court as part of their papers in opposition to the defendants' motions. The Court found that the content of the withheld issues was indistinguishable from the content of the permitted issues. Memorandum Opinion of Kiser, Chief Judge, at 5 n.2 [Opposition Brief:Appendix A].

On September 30, 1993, the District Court granted the motion of Montcalm to intervene permissively as a party plaintiff, and Montcalm's intervenor complaint was filed with the court. (Montcalm learned of these proceedings and of KMCC's decision to exclude certain issues of *Gallery* magazine completely fortuitously; inmate Flora wrote to Montcalm requesting a refund because KMCC had refused to permit him to receive the magazines under his subscription.

On December 13, 1993 a hearing was held before Magistrate-Judge Cynthia D. Kinser. Following the submission of post-hearing briefs, Magistrate-Judge Kinser issued a Report-Recommendation, entered May 5, 1994 (Petition:Appendix D at 31a–63a), determining that DOP 852 was procedurally defective on its face and as applied in that it failed to provide Montcalm, as a publisher, with notice of and an opportunity to be heard regarding the disapproval for distribution to the subscribing inmate of one of its publications, to wit, *Gallery* magazine. The Magistrate recommended that injunctive relief be granted requiring defendants to provide Montcalm with notice and an opportunity to be heard. The Magistrate, however, otherwise upheld the validity of the regulation, rejecting the facial and as applied challenges advanced by the plaintiffs, including plaintiff-intervenor Montcalm.

Thereafter, the District Court (Wilson, J.) issued a Memorandum Opinion and a Final Order dated and entered December 19, 1994. *Hodges v. Commonwealth of Virginia*, 871 F.Supp. 873 (W.D. Va. 1994) [Petition:Appendix B]. Briefly, the court agreed with the Magistrate that the regulation was substantively reasonable and valid. The court, however, disagreed with the Magistrate on the issue of notice, and determined that Montcalm was not, as a matter of procedural due process, entitled to notice and an opportunity to be heard separate and apart from that afforded the inmate. Judgment was granted in defendants' favor dismissing the plaintiffs' claims in their entirety. On appeal, the Fourth Circuit reversed, squarely holding that "publishers are entitled to notice and an opportunity to be heard when their publica-

tions are disapproved for receipt by inmate subscribers." *Montcalm Publishing Corporation v. Beck*, 80 F.3d 105, 106 (1996) [Petition:Appendix A]. The Fourth Circuit remanded the case to the District Court for "a determination of the appropriate process to be provided to publishers of rejected publications." *Id.* at 110. Petition for rehearing was denied.

Summary of the Argument

The Fourth Circuit correctly held that magazine publishers, such as respondent, are entitled to notice and an opportunity to be heard when their publications are disapproved by prison authorities for receipt by inmate-subscribers. The ruling by the court below involved application of well-settled law. Petitioner's contention, rejected without comment by the Fourth Circuit, that no Article III case or controversy is present regarding the question of notice and opportunity to be heard is meritless.

Accordingly, no reason exists for this Court to grant the petition for a writ of certiorari. The petition should be denied.

Reasons To Deny The Writ

A. The Fourth Circuit Correctly Held That Respondent Was Entitled To Notice And An Opportunity To Be Heard When Its Publications Are Disapproved For Receipt By Its Inmate-Subscribers

This Court has unequivocally recognized a First Amendment interest in those who wish to communicate with prison inmates. As was true in *Thornburgh v. Abbott*, 490 U.S. 401 (1989), so it is true in the present case: there can be "no question that publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners." *Id.* at 408; *see also Procunier v. Martinez*, 416 U.S. 396 (1974). Although the *Martinez* Court expressly reserved the question of how that interest operates with regard to "mass mailings," *see id.* at 408 n.11, as the Fourth Circuit observed, mass mailings are not involved in this case. Rather, this case concerns solely the receipt of a publication to which an inmate has specifically subscribed and to whom a publisher specifically mails that publication. The issue resolved handily in respondent's favor by the Fourth Circuit was simply whether a publisher who has a First Amendment right to communicate with an inmate-subscriber is entitled to some form of notice and an opportunity to be heard when its publication is disapproved for receipt by the inmate-subscriber. In deciding this issue in respondent's favor, the Fourth Circuit unequivocally rejected the wholly unsupported argument that respondent was not entitled to even

minimal due process protections because its magazine "graphically depict[s] sexual acts of intercourse in every issue without exception". Petition at 17. Petitioners' argument is also contradicted by the requirement of the regulation (DOP 852) that petitioners are charged to uphold, to wit, that publications intended for receipt by inmates be reviewed on a case-by-case and/or issue-by issue basis. *See* DOP 852(VII)(A). Apparently, petitioners believe that they can pick and choose which portions of DOP 852 they will observe and those which they will not.

Petitioners' sensational resort to the line of cases concerned with children and the regulation and prohibition of sexually-oriented materials is alarming inasmuch as these cases are wholly inapposite, having nothing to do with the issue at hand. Petitioners devote an inordinate amount of space in their petition (*see* Petition at 11-17) instructing the Court on various definitions of "obscenity", quoting a letter from the "Feedback" section of *Gallery* (*see id.* at 13 n.2) and relating the alleged detrimental impact that such material has on prison security and rehabilitation efforts (*see id.*). In so doing, petitioners have studiously avoided confronting the very simple issue resolved adversely to them by the Fourth Circuit, to wit, whether magazine publishers, like respondent, who have a First Amendment right as regards communicating with inmate-subscribers, are entitled to notice and an opportunity to be heard when that First Amendment right has been denied.

Petitioners' contention that the Fourth Circuit "declined to follow this Court's decision in *Jones v.*

North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 130-31 (1977), characterizing this Court's First Amendment rule in *Jones* with respect to prison bulk mailings as 'barely implicated' in this case", Petition at 5, represents a gross misrepresentation of the Fourth Circuit's opinion. With respect to *Jones*, the Fourth Circuit stated as follows:

> *Jones* does not control the outcome of this case for two reasons. First, this case does not concern bulk mailings, but rather the sending of publications to those who have specifically subscribed to them. Second, the *Jones* Court simply held that the prisoners' loss of the ability to save money by using bulk mail did not implicate the First Amendment.

80 F.3d at 109 [Petition:Appendix A at 10a]. The Fourth Circuit correctly distinguished *Jones* from the facts and circumstances of the present case.

Additionally, all the courts below uniformly recognized that respondent did indeed have a First Amendment interest in communicating with its inmate-subscribers.[2] Strangely, the district court, engaging in

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[2] As Magistrate-Judge Kinser recognized implicitly and District Judge Wilson stated expressly, "[p]ublishers, indeed, have a First Amendment interest in communicating with prisoners who seek their point of view through subscriptions." *Hodges v. Commonwealth of Virginia*, 871 F.Supp. at 878 (citing *Thornburgh v. Abbott*, 490 U.S. 401, 408, 109 S.Ct. 1874, 1878-1879 (1989)) [Petition:Appendix B at 23a]; *see also* Report and Recommendation at 23, 25 [Petition:Appendix D at 54a., 55a]. The Fourth Circuit also underscored respondent's First Amendment

a misconstruction and misapplication of *Mathews v. Eldridge*, 424 U.S. 319 (1976), determined that respondent's and other similarly-situated publishers' First Amendment interests were adequately protected by the notice given to the inmate-subscriber, and, hence, separate notice to the publishers was not needed. *Hodges v. Commonwealth*, 871 F.Supp. at 878-880 [Petition:Appendix B at 24a-27a]. The Fourth Circuit rightly reversed the district court's decision, reasoning that "[a]n inmate who cannot even see the publication can hardly mount an effective challenge to the decision to withhold that publication". *Montcalm Publishing Corporation v. Beck*, 80 F.3d at 109 [Petition:Appendix at 11a]. Protection of a publisher's First Amendment right cannot depend upon the publisher's fortuitous receipt of the letter that was sent to the inmate, *see id.*, as was the case here.

Respondent is entitled, as a matter of procedural due process, to some form of notice and opportuni-

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interest stating, "[h]aving recognized that Montcalm indeed has a constitutional interest in communicating with its inmate-subscribers, we cannot conclude that it is entitled to no process at all when VDOC prevents the subscribers from receiving Montcalm's publications." *Montcalm Publishing Corporation v. Beck*, 80 F.3d at 109 [Petition:Appendix A at 11a].

That being the case, whether, as petitioners have argued throughout these proceedings, *Cofone v. Manson*, 409 F.Supp. 1033 (D. Conn. 1976), is questionable precedent is wholly beside the point.

It must be pointed out that petitioners did not argue in its objections to the Magistrate-Judge's Report and Recommendation that respondent did not have such a First Amendment right or that this right was not being deprived. *See* Defendants' Objections to the Magistrate Judge's Report and Recommendation [Opposition Brief:Appendix B].

ty to be heard when the State, as a consequence of the prison facility's issue-by-issue review of its monthly magazine *Gallery*, denies a subscribing inmate receipt of that publication. If a protected interest, be it a "property" interest or a "liberty" interest, has been or is about to be deprived, then notice and an opportunity to be heard must have been or must be afforded in some fashion. That much is settled law. *See, e.g., Leis v. Flynt*, 439 U.S. 438, 99 S.Ct. 698 (1979); *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893 (1976); *Blount v. Rizzi*, 400 U.S. 410, 91 S.Ct. 423 (1971); *Richardson v. Town of Eastover*, 922 F.2d 1152, 1160 (4th Cir. 1991); *Propert v. District of Columbia*, 948 F.2d 1327, 1332 (D.C. Cir. 1991) ("Nevertheless, however weighty the governmental interest may be in a given case, the amount of process required can never be reduced to zero — that is, the government is never relieved of its duty to provide some notice and some opportunity to be heard prior to final deprivation of a property interest.") (emphasis in original); *Berg v. Commander, Fifth Coast Guard District*, 810 F.Supp. 703, 709 (E.D.Va. 1992) (noting that it is settled law that procedural due process must accompany a deprivation of a constitutionally-protected liberty or property interest), *aff'd*, 27 F.3d 562 (4th Cir. 1994); *Bosley v. Baltimore County, Maryland*, 804 F.Supp. 744, 749 (D. Md. 1992), *aff'd*, 986 F.2d 1412 (4th Cir. 1993). Petitioner errs in arguing to this Court, and the district court below erred in concluding, that, under *Mathews v. Eldridge, supra*, due process is a flexible enough concept to allow for no process at all. This construction and application of *Mathews* is wholly without any legal basis. Entirely correctly, the Fourth

Circuit did not cite to (except insofar as it set forth the reasoning of the District Court), much less discuss, *Mathews*, no doubt because the issues raised in *Mathews* are demonstrably different from those raised in this case.[3]

Petitioners contend that affording respondent procedural due process protections "creates a heretofore unrecognized basis for federal judicial supervision of state prisons" and that it "wrongly increases the expense and burdens of prison administration." Petition at 18. Petitioners fail to explain how affording respondent minimal Due Process protections constitutes "federal judicial supervision of state prison" and its claim that prison administration expense and burdens would increase falls far short of the "unduly burdensome" requirement of *Martinez*. *See Martinez*, 416 U.S. at 419.[4] As the Fourth Circuit observed, "[a]t present, VDOC procedures require written notice to inmates when a publication is

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[3] The issue in *Mathews* was "whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing." *Mathews*, 424 U.S. at 323. Not at issue in *Mathews* was whether the recipient need be notified of benefits termination or whether the recipient need be afforded any opportunity to be heard regarding benefits termination.

[4] Petitioners' citation to *Lawson v. Dugger*, 840 F.2d 781 (11th Cir. 1987), *vacated*, 490 U.S. 1078 (1989), *on remand*, 897 F.2d 536 (11th Cir. 1990), *on remand*, 844 F.Supp. 1538 (S.D. Fla. 1994), and notation that Florida adopted review procedures substantially similar to the regulations at issue in *Abbott*, undercuts their argument regarding the expense and burdens of affording publishers notice of and an opportunity to be heard on the exclusion of one of its publications.

disapproved." 80 F.3d at 109 [Petition:Appendix A at 11a]. That being the case, "providing a copy of this notice to publishers of disapproved publications and allowing the publishers to respond in writing would pose a minimal burden on corrections officials." *Id.*

DOP 852 does not provide for any notice to or opportunity to be heard by publishers, like Montcalm, whose magazines are denied to their inmate-subscribers. DOP 852 is, therefore, unconstitutional on its face for failing to provide to such publishers even the most minimal protections of the Due Process clause. That inmates and those on the outside wishing to communicate with them must suffer a curtailment of constitutional rights does not afford a basis for prison administrators to completely deny a non-inmate correspondent even the most minimal protections of the Due Process clause. Given the Fourth Circuit's unremarkable application of settled law in respondent's favor, no reason exists for this Court to grant the petition for a writ of certiorari.

B. The Fourth Circuit Did Not Err In Rejecting Without Comment Petitioner's Argument That Respondent Lacks Standing To Seek Declaratory Relief And That No Article III Case Or Controversy Exists

Petitioners argue that "[o]nce a final judicial determination had been made that the VDOC effectively, and correctly, banned *Gallery* from Virginia's prisons – an issue that became final when the inmates and Montcalm failed to appeal the district court's

judgment on that issue – no case or controversy existed any longer." Petition at 25. Petitioners' argument that no live case or controversy is present and that respondent lacks standing to pusue declaratory and injunctive relief is meritless. The court below rightly rejected this argument without comment, both in reversing the decision of the district court and in denying petitioner's petition for rehearing.

In so arguing in their petition, petitioners misrepresent the determination of the district court regarding the substantive issue as to the propriety of the prison's disapproval of specific issues of *Gallery*. The district court, in adopting the recommendations of the magistrate, ruled that petitioners had not unconstitutionally disapproved for distribution to the subscribing inmates specific issues of *Gallery*. Neither the magistrate nor the district court was called upon to pass judgment on any absolute ban on any and all issues of *Gallery*. Moreover, the district court did not dispute or disagree with the magistrate's determination that monthly reviews of *Gallery* was required by DOP 852; rather, the district court disagreed that separate notice of any disapproval as a result of that monthly review needed to be provided to respondent.

An Article III case or controversy exists between the State and respondent permitting and warranting declaratory and injunctive relief in respondent's favor because each time respondent's publication *Gallery* is not permitted to be delivered to the subscribing inmate, respondent's First Amendment right to communicate to that subscriber is adversely affected. Each time respondent fails to

receive notice of that denial and thus is not afforded an opportunity to comment on the denial, respondent is deprived of the process due it under the Fourteenth Amendment, as has been set forth above at length. The opportunity to comment upon the denial is crucial for it is here that respondent, unlike the inmate-subscriber who will not know what the "offending" passages consist of or in what context they were presented, can attempt to persuade the prison officials charged with applying DOP 852 that a "reasonable person viewing the depiction or representation [in the particular month's issue involved] would find that the material taken as a whole [does not] appeal[] to a prurient interest in sex." DOP 852 (VIII)(D)(2).[5] The injury respondent suffers could not be more real and immediate, *see City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983), and well-established law holds that violations of constitutional rights are generally recognized to be irreparable and sufficient to

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[5] It must be borne in mind that the regulation sets forth a two-part test, the first part of which focuses on whether certain conduct is represented or described in the publication, and the second part of which requires that the "offending" matter be placed in the context of the publication as a whole so that a determination can be made whether the publication as a whole would appeal to a prurient interest in sex from the point of view of a reasonable person.

Based upon the text of the regulation, then, *Gallery* cannot be rejected for dissemination to the inmate-subscriber solely on the ground that it contains written passages that describe certain conduct. Satisfying the first part of the test is insufficient, and satisfying the first part of the test does not mean that the second part is automatically satisfied without any further inquiry of deliberation on the part of the prison officials charged with applying the regulation. Hence, input from respondent should not be viewed as a futile act, and notice to respondent cannot be viewed as pointless.

justify injunctive relief. *Ross v. Meese*, 818 F.2d 1132, 1134-1135 (4th Cir. 1987) (noting that the denial of a constitutional right constitutes irreparable harm for the purposes of equitable jurisdiction); *Scelsa v. City University of New York*, 806 F.Supp. 1126 (S.D.N.Y. 1992); *Multimedia Publishing Company of South Carolina, Inc. v. Greenville-Spartanburgh Airport Dist.*, 774 F.Supp. 977, 986 (D.S.C. 1991) (denial of First Amendment right to distribute newspapers in a public forum constitutes irreparable injury thus entitling plaintiff to injunctive relief), *aff'd in part and vacated and remanded in part*, 991 F.2d 154 (4th Cir. 1992); *United States for the Use of Pensacola Construction Co. v. St. Paul Fire and Marine Insurance Co.*, 705 F.Supp. 306, 310 (W.D. La. 1989) ("The loss of procedural rights . . . is the kind of damage protected by the Declaratory Judgment Act."); *United States v. State of Michigan*, 508 F.Supp. 480, 492 (W.D. Mich. 1980) ("Where the denial of fundamental interests such as constitutional rights are involved, damage is presumed to be irreparable and an injunction should issue as a matter of course."), *aff'd*, 712 F.2d 242 (6th Cir. 1983).

The presence of adverse legal interests between parties, such as exists between respondent Montcalm and petitioners, supplies the requisite case or controversy within the meaning of Article III and the Federal Declaratory Judgment Act. *White v. National Union Fire Insurance Company of Pittsburgh, Pa.*, 913 F.2d 165, 167 (4th Cir. 1990).

Petitioners have adopted the position that they will continue to disapprove *Gallery* for distribution to

inmate-subscribers based upon past disapprovals, notwithstanding DOP 852 which requires issue by issue, month by month review and that they will not give notice of such disapprovals or afford Montcalm an opportunity to comment upon the disapprovals. Accordingly, there exists a sufficient likelihood that Montcalm will be wronged again in the future. *See City of Los Angeles v. Lyons*, 461 U.S. at 105, 111.

As they essentially argue now, albeit within the framework of Article III jurisprudence (*see* Petition at 26-27), so they argued before the magistrate, to wit, that Montcalm knows "that *Gallery* will not be approved for future dissemination until its material is 'toned down'"; hence, declaratory and injunctive relief is unnecessary and would serve no real purpose. Report and Recommendation at 26 [Petition:Appendix at 56a]. The magistrate deftly rejected these arguments stating,

> In response to these contentions, the court need only turn to the review process itself, which belies the Commonwealth's position. The PRC conducts monthly evaluations of publications to which the individual institutions have objected. The PRC then determines whether that monthly issue violates DOP 852. It makes no judgment about future issues. Indeed, DOP 852 VII.A. states that "each facility will approve or disapprove publications for receipt by inmates on a *case-by-case* and/or *issue-by-issue* basis . . ."].

Report and Recommenation at 26 (emphasis supplied) [Petition:Appendix D at 56a-57a]. As Magistrate-Judge Kinser trenchantly observed, "[t]he review process itself which requires each issue of a publication to be evaluated makes declaratory and injunctive relief appropriate to Montcalm under these circumstances." Report and Recommendation at 31 [Petition:Appendix D at 62a]. Tellingly, petitioners did not file any objection to this portion of the Magistrate-Judge's Report and Recommendation. *See* Defendants' Objections [Opposition Brief:Appendix B].

No issue under Article III is raised warranting further review by this Court.

Conclusion

For the reasons set forth above, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A—MEMORANDUM OPINION AND ORDER OF CHIEF JUDGE JACKSON L. KISER

CLERK'S OFFICE U.S. DIST. COURT
AT ROANOKE, VA.
FILED JUNE 16 1993
JOYCE F. WITT, Clerk
Deputy Clerk/stamp

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION

DONALD A. HODGES,

Plaintiff,

v.

COMMONWEALTH OF VIRGINIA. et al.,

Defendants.

Civil Action No. 92-0696-R
Memorandum Opinion

By: Jackson L. Kiser, Chief Judge
United States District Court

Plaintiff Donald Hodges, an inmate at Keen Mountain Correctional Center [hereinafter "KMCC"], has filed this *pro se* civil action pursuant to 42 U.S.C. §1983, with jurisdiction vested pursuant to 28 U.S.C. §1343. Plaintiff claims that the defendants have violated his constitutional rights by refusing to permit him to receive two issues of *Gallery Magazine*. He

names as defendants several officials and employees with the Virginia Department of Corrections [hereinafter "VDOC"] and seeks monetary damages. The defendants, through counsel, filed a motion to dismiss and plaintiff has responded. This action therefore is ripe for consideration.

Upon motion for summary judgment, the court must view the facts and the inferences to be drawn from those facts, in the light most favorable to the party opposing the motion. *Ross v. Communications Satellite Corp.*, 759 F.2d 355 (4th Cir. 1985). Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). However, [t]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242. (1986).

When a motion for summary judgment is made and properly supported by affidavits, depositions, or answers to interrogatories, the adverse party may not rest on the mere allegations or denials of the adverse party's pleadings. Instead, the adverse party must respond by affidavits or otherwise and present specific facts showing that there is a genuine issue of disputed fact for trial. Fed. R. Civ. P. 56(e). If the adverse party fails to show a genuine issue of fact, summary judgment, if appropriate, may be entered against the adverse party.

Plaintiff alleges in his complaint and supporting documents that he has a subscription to *Gallery Magazine* and that while he has been permitted to receive some of the issues, he was not permitted to receive the June or September 1992 issues after the defendants determined that certain articles in those issues violated Division Operating Procedure ["DOP"] 852.

Plaintiff not only challenges the constitutionality of DOP 852, but also asserts that the policy is not applied consistently within the VDOC and KMCC.

It is well-settled that prison officials can regulate a prisoner's access to incoming publications as long as the regulations are reasonably related to legitimate penological interests. *Thornburgh v. Abbott,* 490 U.S. 401, 413 (1989). In determining whether a regulation satisfies the reasonableness standard, a court must consider the four factors announced in *Turner v. Safely,* 482 U.S. 78, 89-91 (1987). A court assessing a regulation's reasonableness under *Turner* must consider: 1) whether a legitimate governmental objective is involved and whether there is a rational connection between that objective and the regulation; 2) whether the inmate has other means of exercising the constitutional right in question; 3) whether accommodation of the right would have a ripple effect within the institution; and 4) whether there is an absence of ready alternatives for the institution to accommodate the inmate's rights. *Id.*

The defendants argue in their motion for summary judgment that DOP 852 satisfies the *Turner* reasonableness standard. DOP 852 permits inmates to receive subscription magazines directly from the publishers as long as the publications "are not obscene, and do not pose a threat to the security, discipline, and good order of the institution." Under the regulation, publications are reviewed on an issue-by-issue basis at the local level to determine whether they come within the terms of the guideline. Once a determination is made at the local level that a publication violates DOP 852, the publication is sent to the VDOC Publication Review Committee. If the Review Committee concurs in the findings at the local level, the publication is returned to the institution, which notifies the

inmate of its disapproval and presents him with the option of having the issue destroyed or sent home.

In the instant case, plaintiff's two issues of *Gallery* were disapproved for receipt into KMCC because articles in those issues violated the obscenity provisions of DOP 852.[1] The Review Committee concurred in the decision, and plaintiff was notified of the disapproval and given the opportunity to direct the disposal of the issues.

While the defendants have addressed the reasonableness of DOP 852 under the *Turner* standard, their motion is silent as to plaintiff's claim that the regulation has been applied arbitrarily and inconsistently within KMCC. In the supporting documents filed with his complaint plaintiff claims that the KMCC library contains books with explicit sexual descriptions which also violate DOP 852, Plaintiff also alleges that some inmates at KMCC were permitted to receive the June 1992 issue of *Gallery* which he and other inmates were denied. In addition, plaintiff has submitted a copy of the August 1992 issue of *Gallery* presumably to demonstrate that the articles in this issue received approval under DOP 852 despite the fact

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[1] DOP 852 provides that a publication may be disapproved as obscene if it:

(1) depicts or describes sexual conduct in such a way to include, either:
a) representations or descriptions or actual sexual intercourse, normal or perverted, anal or oral; or,
b) representations or descriptions of excretion in the context of sexual activity or lewd exhibitions of uncovered genitals in the context of masturbation or other sexual activity ; and,
(2) a reasonable person viewing the depiction or representation would find that the material taken as a whole appeals to a prurient interest in sex.

that they contain the same types of depictions which caused the June and August [sic] issues to be disapproved.[2]

Because the defendants have not addressed plaintiff's claim concerning the allegedly inconsistent application of DOP 852, I must deny the defendants' motion for summary judgment. Inasmuch as an evidentiary hearing will be held as to this claim, I deem it prudent to save the larger question of the constitutionality of DOP 852 for further development at the evidentiary hearing.

Inasmuch as this matter originally arose in the Abingdon Division of this court, the case will be transferred to the Honorable Samuel G. Wilson to conduct any further proceedings in this matter.

The Clerk of the Court is directed to send certified copies of this Memorandum Opinion and accompanying Order to plaintiff and to counsel of record for the defendants.

ENTER: This 16th day of June, 1993.

Jackson L. Kiser/signature

CHIEF U.S. DISTRICT JUDGE

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[2] I have compared the articles in this issue with the challenged articles in the June and September issues and can find no difference whatsoever between the two sets of articles in terms of the obscenity criteria laid out in DOP 852.

CLERK'S OFFICE U.S. DIST. COURT
AT ROANOKE, VA.
FILED JUNE 16 1993
JOYCE F. WITT, Clerk
Deputy Clerk/stamp

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION

DONALD A. HODGES,

Plaintiff,

v.

COMMONWEALTH OF VIRGINIA. et al.,

Defendants.

Civil Action No. 92-0696-R

ORDER

By: Jackson L. Kiser, Chief Judge
United States District Court

In accordance with the written Memorandum Opinion entered this day, it is hereby ADJUDGED and ORDERED that the defendants' Motion for Summary Judgment is DENIED.

The Clerk of the Court is directed to send certified copies of this Order and accompanying Memorandum Opinion to plaintiff and to counsel of record for the defendants.

ENTER: This 16th day of June, 1993.

Jackson L. Kiser/signature
CHIEF U.S. DISTRICT JUDGE

APPENDIX B—DEFENDANTS' OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION

DONALD A. HODGES, et al.,

Plaintiffs,

v.

COMMONWEALTH, et al.,

Defendants;

and

MICHAEL G. FLORA, et al ,

Plaintiffs,

v.

COMMONWEALTH, et al.,

Defendants.

DEFENDANTS' OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

CIVIL ACTION NO. 92-0696
CIVIL ACTION NO. 92-3907

Defendant officials of the Virginia Department of Corrections (VDOC), by counsel, respectfully object to that portion of the Recommendation of the Magistrate Judge which requires the VDOC to provide notice to Montcalm Publishing Corporation (Montcalm) whenever an issue of *Gallery* magazine is denied for receipt into a VDOC prison. Specifically, defendants object to Recommended Finding of Fact No. 13 and Recommended Conclusions of Law Nos. 25-28. Defendants submit that they are not required to give notice to a purveyor of a pornographic magazine when its magazine has been disapproved for receipt into a state prison. Alternatively, defendants request the Court to exercise its discretion and decline to grant an injunction or declaratory relief to Montcalm, inasmuch as any judgment in Montcalm's favor would have no practical effect.

I.

PRISON AUTHORITIES ARE NOT REQUIRED TO GIVE NOTICE TO SENDERS OF MASS PORNOGRAPHIC MAILINGS THAT THEIR MAILINGS HAVE BEEN DENIED FOR RECEIPT INTO STATE PRISONS

In *Procunier v. Martinez*, 416 U.S. 396 (1974), the Supreme Court determined, among other things, that the author of a personal letter written to an inmate is entitled to notice if his letter is rejected for receipt into the prison. 416 U S. at 417-419. The *Martinez* decision, however, clearly is limited to correspondence in the nature of personal letters. The Court explicitly reserved judgment as to whether mass mailings were entitled to the same institutional protections as individual correspondence 416 U.S. at 408 n. 11. The Court has not revisited this issue since that time.

In *Thornburgh v. Abbott,* 490 U.S. 401 (1989), the Court observed that publishers wishing to communicate with inmates who "willingly seek their point of view have a legitimate First Amendment interest in access to prisoners." 403 U.S. at 407. The Court did not, however, address the notice issue since the Bureau of prisons' regulations challenged in *Abbott* provided for notice to publishers in the event that a publication was disapproved for receipt. Apart from the "mass mailings" issue that the *Martinez* Court reserved, the Supreme Court has never squarely addressed the subject of notice when the mass mailing consists of pornographic material.

Neither the Fourth Circuit or [sic] any district circuit within this circuit has written about the subject of publisher notice. Notwithstanding the discussion of several cases on p. 24 of the Magistrate Judge's Report and Recommendation, the *only* decision that explicitly extends a notice requirement to publishers is the decision in *Cofone v. Manson,* 409 F.Supp. 1033 (D.Conn 1976). Even that single case appears to have been wrongly decided, inasmuch as the only plaintiff in the proceeding was an inmate whose standing to raise the issue of publisher notice is questionable. Thus this Court confronts a novel issue of constitutional law when it determines whether publishers of mass mailings, or publishers of pornographic materials, are entitled to notice when prison authorities reject a magazine for receipt into a prison facility.[1]

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[1] Although the issue of notice to publishers is unresolved, the question presented is one purely of law and can be resolved without resort to a review of the trial proceedings.

The clear rationale behind both the *Martinez* and *Abbott* decisions is the unassailable notion that the communication of ideas ordinarily should flow freely, and that when there is adequate justification to restrict that flow of information, such as in a prison context, then both the sender and intended recipient should have notice and an opportunity to contest the decision. Yet, the Court has clearly recognized that mass mailings may present a particular problem in the prison context; accordingly, different considerations may apply than would be applicable in the case of an individual sender. *See Martinez* n. 11. Such considerations become even more problematic when the mass mailing contains pornographic, or even obscene, material.

The letters contained in the "Feedback" section of *Gallery* are devoid of any ideas that have an entitlement to constitutional protection. The letters themselves are clearly obscene and, viewed apart from the rest of the magazine, would be entitled to no First Amendment protection in free society. *See Paris Adult Theatre I v. Slayton*, 413 U.S. 49 (1973). Clearly prison authorities can isolate their attention upon specific portions of a magazine in deciding whether the publication may be allowed into a prison. *Thornburgh v Abbott,* 490 U.S. at 418-19 (discussing Bureau of Prisons "all-or-nothing" rule). Montcalm is charged with recognizing that the contents of its "Feedback" section in each *Gallery* issue contains legally obscene materials. Montcalm is further charged with knowledge of the fact that prison authorities may focus their attention on these obscene letters in determining whether the magazine is suitable for admission into a prison. Since the letters are not entitled to constitutional protection, in a prison setting, there accordingly should be no requirement that the sender of these materials receive notice when the magazine containing the letters is disapproved for receipt.

II.

THIS COURT SHOULD EXERCISE ITS DISCRETION AND REFUSE TO ISSUE EITHER AN INJUNCTION OR DECLARATORY RELIEF

Assuming *arguendo* that Montcalm has some entitlement to notice when a decision is reached to disapprove *Gallery* for receipt into Virginia's prisons, this Court should nonetheless exercise the discretion available to it to decline to issue either injunctive or declaratory relief. The legal authorities that support the conclusion that this Court may exercise discretion in this regard are discussed at pp. 19 and 20 of the Defendants' Post-Trial Memorandum Of Law and will not be repeated herein. The Magistrate Judge recommends that the Court reject the defendants' argument in this regard because the VDOC regulation requires a review of every issue of a magazine, notwithstanding the fact that the ultimate decision is, for all practical purposes, preordained.

The reality is that *Gallery* had been consistently disapproved for receipt for well over a year at the time that this case was heard. The content of the "Feedback" section has always been replete with obscene letters, and Montcalm has not given any indication that it might alter the magazine's format in order to make it acceptable for receipt into Virginia's prisons. Thus there is no practical effect of a notice requirement for Montcalm. A requirement that the VDOC give Montcalm notice that each and every issue of *Gallery* continues to be unacceptable is meaningless. Since the question of notice to other publishers is not presently before the Court, these defendants respectfully ask the Court to

exercise its discretion and decline to issue either an injunction or a declaratory judgment in Montcalm's favor with respect to the notice issue.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA, et al ,
By Mark R. Davis/signature
Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 1994, a true copy of the foregoing Defendants' Objections To The Magistrate Judge's Report And Recommendation was mailed, postage prepaid, to Keith S. Orenstein, Counsel for Montcalm Publishing Corporation, 635 Madison Avenue, New York, New York, 10022; to Daniel R. Bieger, Local Counsel for Montcalm Publishing Corporation, 212 West Valley Street, P.O. Box 1296, Abingdon, Virginia, 24210; to Donald A.

Hodges, #144652, Keen Mountain Correctional Center, P O Box 710, Keen Mountain, Virginia, 26424; and to Michael G. Flora, #190234, Keen Mountain Correctional Center, 2 0. Box 710, Keen Mountain Virginia, 25424.

Mark R. Davis/signature
Mark R. Davis
Assistant Attorney General